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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 156

MORROW RADIO MANUFACTURING CO., a corporation,
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

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STATUTES:

Internal Revenue Code of 1954:

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RULINGS:

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The petitioner named above prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on February 13, 1961.

OPINIONS BELOW

The opinion of the district court (R. 19-22) is reported at 179 F. Supp. 436. The opinion of the court of appeals (Appendix A, pp. A1-A9, *infra*) is reported at 287 F. 2d 502.

JURISDICTION

The judgment of the court of appeals (Appendix B, p. A10, *infra*) was entered on February 13, 1961. A timely petition for rehearing was filed on March 13, 1961, (R., Vol. II, p. 11-A)[1] and was denied on March 20, 1961 (Appendix C, pp. A10-A11, *infra*). A motion for leave to file a further petition for rehearing was filed on March 25, 1961, and was denied on March 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

This is a civil action, arising under acts of Congress providing for the internal revenue, of which the United States District Court has original jurisdiction under 28 U.S.C. § 1340.

QUESTIONS PRESENTED

1. Whether the court of appeals can require the taxpayer to pay the manufacturers excise tax upon the sale of items of radio equipment, some of which were not specified by Congress in section 4142 of the Internal Revenue Code of 1954 as being subject to the tax imposed under section 4141, without delineating why the articles are regarded as taxable, without construing crucial provisions of the statute, without defining necessary terms, and without giving effect to the administrative interpretation of Treasury Regulations and rulings of the Internal Revenue Service.

2. Whether the receivers, fixed-tuned receivers, power supply units, and converters manufactured and sold

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[1] In forwarding the record in the court of appeals, the Clerk has designated the entire Petition of Appellant for Rehearing as page 11-A of his certified transcript, which is designated as Vol. II of the record.

by taxpayer were radio components, within the meaning of section 4142 of the Internal Revenue Code of 1954, so as to be subject to the manufacturers excise tax imposed under section 4141 upon their sale. This question, in turn, depends upon whether or not these items are specifically named in section 4142 and, if so, whether they are individually in fact suitable for use on or in connection with, or as component parts of any of the articles enumerated in section 4141, *i.e.*, radio receiving sets as applicable herein.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are sections 4141 and 4142 of the Internal Revenue Code of 1954, as amended. The regulations involved are Treasury Regulations on Manufacturers Excise Taxes (1954 Code), Sec. 40.4141-1 and 40.4142-1. These are set forth in Appendix D, pp. A11-A17, *infra*.

STATEMENT

The petitioner, an Oregon corporation (herein referred to as "taxpayer"), during the period October 1, 1955 through September 30, 1958, was engaged in the manufacture and sale of various articles of radio equipment, among which were items designated and commonly known in the trade as receivers, fixed-tuned receivers, converters, power supply units, and speakers. Each of these articles was manufactured and sold as a separate unit in a separate cabinet, primarily as amateur or "ham" radio equipment (R. 23-25).

The individual articles in question did not constitute complete radio receiving sets, and they were not sold by the taxpayer in groups which, taken together, would

constitute a complete operable assembly. They were sold separately. They were not of the entertainment type. (R. 28, 131-138) There was no evidence that any one of these articles was used by the taxpayer in the manufacture and sale of a complete radio receiving set. Likewise, there was no evidence that any of these articles was used by, or was of the type used by, any other person in the manufacture and sale of a complete radio receiving set, taxable under section 4141 of the Internal Revenue Code of 1954.

The Government assessed manufacturers excise tax against the taxpayer on sales of this equipment made during the period of October 1, 1955, through September 30, 1958. A portion of the amount assessed was paid by the taxpayer and claims for refund were timely filed. These were rejected by the Government. The taxpayer then filed a timely suit for refund in the District Court for the District of Oregon. The Government counterclaimed for the amount of the assessment not previously paid by the taxpayer (R. 12-14).

In its suit for refund of the excise tax paid, the taxpayer contended in the district court that none of the articles manufactured and sold by it during the period in question was subject to the manufacturers excise tax imposed by section 4141 of the Internal Revenue Code of 1954, that none was of the "entertainment type," and that none was a "radio component" as defined by section 4142 of the Internal Revenue Code of 1954. This was tantamount to contending that, if the articles should be considered to be radio receiving sets within the meaning of section 4141, they should not be subject to the tax because they were not of the "entertainment type," the only type subject to tax during the period in question. It was also a direct

contention that the articles were not subject to the tax because they were not radio components. The Government contended that the articles in question "are either of the 'entertainment type' or are 'radio components'." (R. 14-15)

The district court held that the articles were not of the "entertainment type" but did hold for the Government that each of the articles involved was a radio component, manufactured and sold as such (R. 28). Judgment was entered by the district court against the taxpayer and in favor of the Government on its counterclaim for unpaid taxes and interest (R. 30-31).

The taxpayer then appealed to the court below (R. 32). That court affirmed, holding that "the trial judge was correct in holding that Morrow was a manufacturer of components within the meaning of §§ 4141 and 4142."[2] That court also held that it did not feel "that an examination of" the statute "supports the position that Morrow advances." That court made no attempt to show the interrelationship between the two sections of the statute and their relationship to the Treasury regulations and administrative rulings, and to correlate these with the actual facts of the case. (Appendix A, pp. A5-A6, *infra*.)

After the decision of the court of appeals was handed down, the taxpayer filed a petition for rehearing on March 13, 1961, in an attempt to point out to that court some basic misconceptions and errors in its interpretation and application of a rather technical and complex section of the law (R., Vol. II, p. 11-A; f. n. 1, *supra*). This petition for rehearing was promptly denied on March 20, 1961 (Appendix C, pp. A10-A11, *infra*).

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[2] It should be noted that the tax is placed upon the sale, not the manufacture.

REASONS FOR GRANTING THE WRIT

Review should be granted by this Court because the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The tax here brought into question is a manufacturers excise tax, imposed upon the sale by a manufacturer, producer, or importer of certain specified articles. It should be noted at the outset that this tax is not a general franchise tax, imposed upon manufacturers generally or upon manufacturers within a certain industry. It is a tax imposed only upon the sale of articles specifically selected and enumerated by the Congress in the statute. Items not named in the statute are not subject to the tax, even though they may be related to or within the same general field of manufacture as those items which are.

The basic question presented is whether the items manufactured and sold by the taxpayer were "radio components," as defined in section 4142, so as to be subject to the tax imposed by section 4141 upon the sale of "radio and television components" by manufacturers.

Whether or not an article is a radio component depends upon two factors: (1) it must be specifically named in section 4142; and (2) if named, it must be suitable for use on or in connection with, or as a component part of one of the articles enumerated in section 4141. The articles enumerated in section 4141 are: radio receiving sets, television receiving sets, phonographs, etc.

Since nothing is taxable as a radio component unless it is suitable for use with an article named in section 4141, it is imperative that the meaning of the term "suitable for use" be correctly interpreted and applied. The Treasury Department in its Regulations on Manufacturers Excise Taxes, Sec. 40.4142-1 (b), has defined this term to mean items that "are commonly used with any of the articles enumerated in section 4141 and paragraph (a) (1) through (6) of § 40.4141-1" (of the regulations) or which "possess actual, practical commercial fitness for such use." (Appendix D, p. A16, *infra*).

No less important to determination of this issue is the correct understanding of what is meant by a "radio receiving set," the item enumerated in, and subject to tax upon its manufacture and sale under section 4141. Although this item has been subject to the manufacturers excise tax since 1941 (Revenue Act of 1941, c. 412, 55 Stat. 687), a period of twenty years, the Treasury Department has never seen fit to issue a definition of it in regulations promulgated in this general area. It has, however, been defined in Revenue Ruling 56-388, 1956-2 Cum. Bull. 808 (Appendix E, pp. A17-A19, *infra*) as part of the definition of "manufacturer."

The court below, completely eschewed any aid from the Treasury Regulations and Revenue Ruling in its determination that the articles manufactured and sold by the taxpayer were subject to tax.

Of the four articles in question, only one, the power supply unit, is specifically named in section 4142.[3]

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[3] Speakers sold during the period in question were admitted by the taxpayer to be subject to the tax (R. 28).

First. The court below has ruled upon an important question of federal tax law without giving the taxpayer the benefit of the application of the official Treasury Regulations on two points: (1) as to why three items (receivers, fixed-tuned receivers, and converters) were held subject to the tax as though they had been named in the statute, and (2) as to the meaning and interpretation of the key phrase "suitable for use." The taxpayer was likewise deprived of the benefit of a pertinent revenue ruling, *supra*, giving the administrative interpretation of what constitutes a "radio receiving set."

In its opinion, the court below does not even mention the pertinent Treasury Regulations, much less discuss their applicability to the factual situation and as to whether the items in question were "commonly used" or "had actual, practical commercial fitness for use" with a radio receiving set. It makes no definitive ruling in its opinion as to what the statute means by the term "radio receiving set" with which an article is required to be "suitable for use" before being classed as a radio component subject to tax, even though it completely ignores the administrative ruling on this subject. No effort at all is made to explain why three items not even named in the statute are held subject to the tax.

The promulgation of regulations and rulings for the interpretation and administration of the tax laws by the Commissioner of Internal Revenue and Secretary of the Treasury is not only sanctioned by statute but is, also, a practice which has been recognized fully by this Court from earliest times. This principle is so well known as not to require the citation of any authority.

Indeed, it is difficult to find a tax case in which the regulations do not play a prominent part.

An opinion of a court of appeals, which ignores such basic criteria for judging the applicability of the tax laws, should not be allowed to stand unreviewed by this Court. If the court of appeals chose to ignore the regulations and rulings and to interpret the statute under its own standards, then it should have explained in some detail why three items, not named in the statute, were held subject to the tax, way all of the items under consideration were considered "suitable for use," and what it considered to be a radio receiving set within the meaning of section 4141. This, it failed to do.

Review and correction of an erroneous decision of a court of appeals is especially important in cases involving federal excise taxes. Because of the small number of such cases that reach the level of that court or this Court, an erroneous decision could stand for many years and cause untold hardship by being employed as a precedent by the tax collecting authorities. In our search for a conflict of decisions on the precise point involved here, we found no other decided case under these sections, even though the tax in question has been in effect for nearly thirty years (Revenue Act of 1932, c. 209, 47 Stat. 169).

Importance to Industry. There are a great number of manufacturers in this country engaged in the production and sale of items listed in section 4142. A report on hearings before a subcommittee of the House Committee on Ways and Means in 1956 showed revenue of $17 million annually from the tax paid on radio and television components. This would indicate sales of

$170 million per year, inasmuch as the tax is 10 percent of the selling price of each of the articles. The industry possibly affected is larger than this, however, as there are many articles named in section 4142 which are now manufactured and sold free of tax because they are not considered suitable for use with articles named in section 4141. An ill-conceived decision such as the present one, which pays virtually no attention to the prime requisite of taxability—"suitable for use"—and makes no attempt to understand its several facets and to apply it correctly, could conceivably change this picture to a marked degree.

Importance to individual taxpayers. The tax imposed upon the sale of radio and television components is 10 percent of the price for which the article is sold. This means a payment to the Government of 10 percent on *gross sales.* And the tax is imposed upon the manufacturer; it is not collected by him from his customer as are some taxes which are imposed upon the purchaser. Of course, those manufacturers who are clearly subject to the tax pass it on to their customers at the time of sale. The horror to the individual taxpayer lies in the fact that the Government may, under such a decision as this, go back for a number of years and assess tax upon the sale of items which, at the time of sale, were not thought to be taxable. Since it is doubted that there are many businesses that have a net income of 10 percent on gross sales, little imagination is required to visualize the financial ruin implicit in the assessment of tax at this rate for a period of several past years.

Second. The present problem of whether the sale of articles by a manufacturer is subject to the manufacturers excise tax imposed by section 4141 is

a recurring one. It is important to the proper administration of the Internal Revenue laws that the Supreme Court settle the law in this vital area of federal taxation. This Court should determine and clearly decide what the Congress meant by making the taxability of articles named in section 4142 subject to their being suitable for use with radio receiving sets or other articles enumerated in section 4141.

The Treasury Regulations (Appendix D, p. A16, *infra*) state that articles are considered "suitable for use" if they are "commonly used with" or "possess actual, practical commercial fitness for use" with articles named in section 4141. For all of the nearly thirty years that a similar provision has been in the tax law, the Treasury Department has failed to include in its regulations a definition of radio receiving sets, etc., although as pointed out, *supra*, it has indirectly given a definition in Rev. Rul. 56-388, 1956-2 Cum. Bull. 808 (Appendix E, pp. A17-A19, *infra*). The court below skirts the issue by changing the frame of reference to state that it finds no intent on the part of Congress to redefine taxable components to mean only those that may be used as parts of radio sets that are contained in a single cabinet. This still does not answer the question as to the nature of the article that an item must be suitable for use with, in order to be designated a radio or television component under section 4142 and taxed under section 4141.

It seems clear that the radio receiving sets with which articles must be suitable for use in order to be classified as radio components must be those subject to tax under section 4141 and that these are radio receiving sets manufactured and sold as single, complete operating units. The sets referred to in section 4141 are

radio receiving sets manufactured and sold by a manufacturer of radio receiving sets for sale. That it is usual commercial practice for such radio receiving sets to be contained in one cabinet is a matter of such common knowledge as to be readily subject to judicial notice as a part of "the general customs and usages of merchants" (*Brown* v. *Piper*, 91 U.S. 37, 42). Treasury Regulations on Manufacturers Excise Taxes, Sec. 48.4141-2 (b), now in effect (Appendix F, p. A20, *infra*), make it plain that a radio receiving set named in section 4141 must have all the parts or accessories which are considered equipment "essential for the operation or appearance" of such articles. This obviously includes the common cabinet for housing all the other articles, which together, with it, make the complete "set."

In this connection, it might be added that there is a decided difference between the radio receiving set named in section 4141 and a loose aggregation of articles put together by a radio engineer or hobbyist and referred to by him as a radio receiving set merely by virtue of the fact that with it he is able to receive radio signals. The tax imposed by section 4141, after all, is a tax on manufacturers. The radio receiving sets and other articles enumerated therein are articles manufactured and sold by manufacturers of complete, finished products. Although, as indicated in the opinion of the court below (Appendix A, p. A5, *infra*), there was some testimony that the various articles manufactured and sold by the taxpayer could be "used with parts manufactured by other manufacturers in order to form radio receiving sets" and "that there are a number of ways in which the parts manufactured by Morrow can be combined in order to form radio

receiving sets," there was nothing in the record to show that these articles were ever so used by manufacturers of radio receiving sets for sale. In fact, the evidence seems to be quite to the contrary, inasmuch as the court made some point of the fact that the articles manufactured by Morrow were always sold as separate units and not as complete radio receiving sets.

Third. The opinion of the court below completely misstates the position of the taxpayer (Appendix A, p. A6, *infra*), in addition to its misinterpretation of the law and its neglect or refusal to be guided by administrative rulings. This was called to the attention of the court in a detailed petition for rehearing (R., Vol. II, p. 11-A; f. n. 1, *supra*). This, however, was denied by the court forthwith (Appendix C, pp. A10-A11, *infra.*) Since much of the court's opinion depends upon its statement that it does not feel that the statute "supports the position that Morrow advances," a misconception of this position must be viewed as a basic flaw in that opinion. This is a basic flaw in a decision of an important question of federal law which has not been, but should be, settled by this Court.

Contrary to the statement in the opinion of the court below (Appendix A, p. A6, *infra*), the taxpayer never "admitted that the radio parts are 'components' as the statute defines them." It would be impossible to do this and contend at the same time that they were not taxable components (as the opinion states the taxpayer did), since the statute only defines taxable components. An article named in section 4142 must be "suitable for use" before it qualifies as a component. If the article is not suitable for use, it is not a component and is not taxable. There is no question as to whether a component is taxable or non-taxable—all components as de-

fined in section 4142 are taxable—but only if both specifications of the definition are met.

In the opinion of the court below, (Appendix A, p. A6, *infra*), it is stated that "Morrow now argues that the parts manufactured are not suitable for use as component parts of a radio receiving set, for they cannot be joined together in a single cabinet in order to form a self-contained radio receiving set." This is another misconception of the position taken by the taxpayer. The taxpayer's argument was not that the articles in order to be considered radio components must necessarily be of such a character that they can be joined together in a single cabinet in order to form a self-contained radio receiving set. It was, rather, that the radio receiving sets, with which articles must be suitable for use in order to be classified as radio components, must be those subject to tax under section 4141 and that these are radio receiving sets which are manufactured and sold as single, complete, operating units.

But more than this, the question is not whether several articles sold by a manufacturer are taxable because all or some of them can be joined together in a certain manner. The test is whether each single article produced and sold is suitable for use with a radio receiving set, etc. This calls, again, for determination of whether the individual article is of a type commonly used with, or that possesses actual, practical commercial fitness for use with radio receiving sets named in section 4141.

At the time of the oral argument the court below was furnished a complete copy of Rev. Rul. 56-388, 1956-2 Cum. Bull. 808 (Appendix E, p. A17, *infra*), referred to *supra*, which indicates that a radio receiving set, taxable under section 4141, is one in which all of the

items necessary to a complete set are contained in a common cabinet. The court in its opinion, does not refer to this revenue ruling, but its statements just referred to would seem to be a thinly-veiled attempt to overrule it by indirection.

The misconception of the taxpayer's position and, thus, the basic misconception of the point in issue by the court below is continued up to the very end of its opinion. The court states (Appendix A, pp. A8-A9, *infra*) that there is nothing in the statute to suggest that the Congress intended to "redefine taxable components to mean only those components that may be used as parts of radio sets that are contained in a single cabinet." The court then concludes its opinion with the observation that: "This being the reasonable interpretation of the statute, we feel that the judgment of the district court must be affirmed." In the taxpayer's petition for rehearing (R., Vol. II, p. 11-A; f. n. 1, *supra*) the attention of the court below was called to the fact that this seemed to be at odds with the determination of the district court (R. 20) but that the court's opinion indicated no disagreement with the lower court. It was further pointed out that this left the law in a very confused state, since the appellate court did not go on to define in positive terms what is meant by the term "radio receiving sets" as used in section 4141 in relation to the question of suitability for use of an article named in section 4142.

It is submitted that review should be had by this Court before taxpayers are further burdened by unjust assessments of manufacturers excise tax based upon the defective and erroneous decision of the court below as a precedent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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